No. 17-1272

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC., *ET AL.*,

Petitioners,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Counsel for Amicus Curiae

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

August 20, 2018

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

WHEN PARTIES HAVE ENTERED INTO A VALID AGREEMENT TO ARBITRATE THRESHOLD DISPUTES OVER ARBITRABILITY, THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO EVALUATE THE MERITS OF THOSE ARBITRABLE DISPUTES, SUCH AS UNDER THE FIFTH CIRCUIT'S "WHOLLY GROUNDLESS" STANDARD. 4

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Am. Exp. Co. v. Italian Colors Rest.,
570 U.S. 228 (2013) 7

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 6

Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010) 5, 6

Vaden v. Discover Bank,
556 U.S. 49 (2009) 7

STATUTES

9 U.S.C. § 1 *et seq.* 4

9 U.S.C. § 2 ..... 2, 6

9 U.S.C. § 4 ..... 6, 8

OTHER AUTHORITIES

David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*,
96 Va. L. Rev. In Brief 1 (2010) 7

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) seeks to present its views, and the views of its supporters, on the issue whether the Federal Arbitration Act (FAA) permits a court to decline to enforce an agreement to arbitrate disputes over threshold issues of arbitrability, such as when the court concludes that a party's claim of arbitrability is "wholly groundless."[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF is committed to the use of arbitration as a viable contractual alternative to litigation for the resolution of disputes. In this respect, NELF is committed to the FAA's core principle that arbitration agreements must be enforced according

---

[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), amicus states that counsel of record for each party has filed a blanket consent letter with the Court for the filing of amicus briefs.

to their terms. Under the FAA, courts have no discretion to disregard or undermine in any way the parties' valid contractual arrangement for the resolution of their disputes by arbitration, including threshold disputes concerning the arbitrability of claims. The FAA does not permit any judicial interference with the arbitrator's exercise of his or her contractually delegated powers.

In addition to this amicus brief, NELF has filed several other amicus briefs in this Court in cases arising under the FAA, arguing for the enforcement of arbitration agreements according to their terms.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

The FAA requires a court to enforce a valid agreement to arbitrate threshold disputes concerning the arbitrability of claims. Such an agreement is "[a] written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, and it therefore must be enforced, "save upon such grounds as exist at law or in equity for the

---

[2] *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

revocation of any contract . . . ." *Id.* Since no such contractual challenge was raised in this case, the FAA required the Fifth Circuit to enforce the parties' agreement that the arbitrator would decide their dispute concerning the scope of their arbitration agreement.

The FAA does not permit a court to usurp the arbitrator's contractually delegated power to decide threshold questions of arbitrability, as the Fifth Circuit did here when it evaluated the merits of such a dispute under its "wholly groundless" standard. Once the parties have agreed to arbitrate disputes over arbitrability, courts no longer have the power to adjudicate those disputes in any way. Indeed, the FAA was enacted to abrogate the ancient "ouster" doctrine, under which courts refused to enforce arbitration agreements when they believed that those agreements wrongfully deprived them of their jurisdiction. In essence, the Fifth Circuit's "wholly groundless" standard is an impermissible attempt to revive this dead and buried doctrine.

ARGUMENT

WHEN PARTIES HAVE ENTERED INTO A VALID AGREEMENT TO ARBITRATE THRESHOLD DISPUTES OVER ARBITRABILITY, THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO EVALUATE THE MERITS OF THOSE ARBITRABLE DISPUTES, SUCH AS UNDER THE FIFTH CIRCUIT'S "WHOLLY GROUNDLESS" STANDARD.

At issue is whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), permits a court to decline to enforce a valid agreement to arbitrate threshold disputes over arbitrability when the court believes that there is no merit to such an arbitrable dispute. The Fifth Circuit did so here under its "wholly groundless" standard. The Fifth Circuit was wrong.

In the dealer agreement between the petitioners, Henry Schein, Inc., *et al.* (Schein), and the respondent, Archer and White Sales, Inc. (Archer), the parties agreed to arbitrate "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), . . . in accordance with the arbitration rules of the American Arbitration Association [(AAA)]." Appendix (App.) 3a. The AAA rules, in turn, provided that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." App. 7a (emphasis added). That is, the parties agreed to a

"delegation provision[, which] is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). *See also id.* at 69 ("[Q]uestions of arbitrability may be delegated to the arbitrator, so long as the delegation is clear and unmistakable.") (citation and internal punctuation marks omitted); App. 7a.

Notwithstanding the parties' arbitration agreement, Archer brought an antitrust claim against Schein in federal court, and Schein moved to compel arbitration. App. 1a-2a. A dispute then arose over the scope of the exception for "actions seeking injunctive relief" contained in the parties' arbitration agreement. App. 2a. Instead of enforcing the parties' delegation provision and submitting this threshold dispute to the arbitrator, the Fifth Circuit decided to evaluate the merits of that arbitrable dispute for itself. App. 11a-16a. The court concluded that Schein's claim of arbitrability was "wholly groundless," and it therefore allowed Archer to proceed with its antitrust claim in federal court. App. 7a, 11a-16a, 45a. This Court has since stayed the federal court proceedings pending its decision in the case.

The Fifth Circuit erred because the FAA required the lower court to enforce the parties' delegation provision, by letting the *arbitrator* decide the parties' arbitrable dispute over the scope of their arbitration agreement. This is because a delegation provision is "[a] *written provision* in . . . a contract evidencing a transaction involving commerce *to settle by arbitration a controversy*

thereafter arising out of such contract . . . ." 9 U.S.C. § 2 (emphasis added).[3] *See also Rent-A-Center*, 561 U.S. at 68-70 (discussing same). Therefore, the provision must be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Since Archer did not raise any such contract defense, the Fifth Circuit was required under the FAA to "place [this] arbitration agreement[] on an equal footing with other contracts . . . and enforce [it] according to [its] terms . . . ." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

After all, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. Therefore, the FAA required the Fifth Circuit to enforce the parties' delegation provision by "mak[ing] an order directing the parties to proceed to arbitration in accordance with the terms of the[ir] agreement." 9 U.S.C. § 4.

---

[3] Section two of the FAA provides, in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Simply put, the FAA does not permit a court to usurp the arbitrator's contractually delegated power to resolve a gateway dispute, such as by evaluating the merits of that dispute as the Fifth Circuit did under its "wholly groundless" standard. Once the parties have agreed to arbitrate disputes over arbitrability, courts no longer have the power to adjudicate those disputes in any way. The Fifth Circuit should have borne in mind that "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013).

Indeed, the FAA was enacted to abrogate the ancient "ouster" doctrine, under which courts refused to enforce arbitration agreements when they believed that those agreements wrongfully deprived them of their exclusive jurisdiction to adjudicate certain disputes.[4] "To the extent that the ancient 'ouster' doctrine continue[s] to impede specific enforcement of arbitration agreements, § 2 of the FAA, the Act's centerpiece provision, . . . directly attend[s] to the problem." *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009) (citations and internal quotation marks omitted).

In essence, the Fifth Circuit's "wholly groundless" standard is an impermissible attempt to revive this dead and buried ouster doctrine. Specifically, the lower court refused to relinquish

---

[4] "The principal thrust of the FAA is to abolish the ouster doctrine, the ancient rule that arbitration clauses improperly deprived courts of their jurisdiction." David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 Va. L. Rev. In Brief 1, 5 (2010).

control over the parties' arbitrable dispute and instead decided that it retained the independent power to evaluate the merits of that dispute for itself. The FAA, however, does not permit such judicial interference with the arbitrator's exercise of her contractually delegated powers.

In sum, the FAA does not permit a court to adjudicate an arbitrable dispute, including an arbitrable dispute over the scope of an arbitration agreement. Instead, the court must allow the arbitrator to decide that dispute. Therefore, the Fifth Circuit's decision should be reversed, and Archer should be compelled to arbitrate the parties' dispute over the scope of their arbitration agreement, under 9 U.S.C. § 4.

CONCLUSION

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

August 20, 2018